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Effective Post-PLRA Settlement Models: A Case Study of Arizona's Protective Segregation Lawsuit

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*John Does 1-5 v. Terry Stewart*¹ was a hard-fought prison conditions-of-confinement class action lawsuit litigated in the United States District Court for the District of Arizona. Relationships between the parties and their counsel were contentious at times. Nonetheless, the collaborative way in which the case was ultimately resolved offers many insights on how to effectively settle such large-scale prisoner rights cases in a post-PLRA litigation environment.

Background

The Plaintiffs in this case were male inmates housed in protective segregation (PS) in the Arizona Department of Corrections (DOC) who faced involuntary transfer to general population (GP).² In response to the planned transfer, Plaintiffs brought a class action in February 1996 under 42 U.S.C. § 1983, alleging that DOC's plan to return them to GP violated their Eighth Amendment right to be free from cruel and unusual punishment.³ The case continued for the next six years before it was successfully concluded in the summer of 2002.⁴

Events That Led to the Class Action Lawsuit

In the summer of 1995, 463 inmates were housed in PS.⁵ DOC places inmates into PS whenever it believes there is a substantial risk that they will be injured by other inmates in GP.⁶ For example, PS inmates may be thought to be "snitches," child molesters, or inmates, who for other reasons, may have incurred the wrath of the numerous gangs found in prison. An inmate enters PS in the Arizona system in one of two ways: voluntarily (when an inmate requests PS) or involuntarily (when DOC transfers an inmate to PS as a result of information that has come to its attention).⁷ Regardless of how inmates enter

1. Class Action Complaint, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Feb. 22, 1996) (under seal).

2. *Id.*

3. *Id.*

4. Order, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. June 19, 2002) (under seal).

5. Plaintiffs' Hearing Memorandum at 2, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Feb. 13, 1998) (under seal).

6. *Id.*

7. *Id.*

PS, however, they are at the bottom of the “pecking order” of prison society.

In June 1995, DOC’s then-director ordered that a Special Review Committee conduct a complete review of all PS inmates.⁸ An affidavit later provided by one of the Committee members suggested that the review was initiated because of the additional security costs involved in housing PS inmates.⁹ However, Charles Montgomery, a former Federal Bureau of Prisons official (and the expert that the court appointed to assist it), opined that: (1) “past practice has resulted in too many placements of unverified [cases into] Protective Custody/Segregation,” and (2) DOC was “far too timid/passive in [its] efforts to encourage or work inmates out of PC.”¹⁰

The Special Review Committee was composed of a DOC Deputy Warden, a Correctional Programs Officer and a Classifications Officer.¹¹ The reviews were conducted over a four-month period, with an average of ten to twelve hearings per day. Most hearings lasted less than thirty minutes. Inmates were not permitted to call witnesses. Even though the inmates often supplied the names of others they claimed could substantiate that they would be in danger if returned to GP, the Special Review Committee did not contact anyone other than the inmate in 360 of the 463 cases.¹²

The Special Review Committee recommended that ninety-two inmates remain in PS, but that 274 PS inmates be involun-

8. *Id.*; see also Plaintiffs’ Trial Ex. No. 41, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Sept. 16, 1996) (not under seal).

9. Reply in Support of Request for Modification of Order at Attachment, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Jan. 12, 1996) (under seal).

10. Charles Montgomery, *Issues Relating to the Alleged Impropriety of Reclassifying Inmates Currently in Protective Segregation to Other Classifications Within the Agency by the Arizona Department of Corrections* at 16, 20; (*Doe*) v. *Savage*, CIV 95-01101-PHX-CLH (D. Ariz. Jan. 24, 1996).

11. See Plaintiffs’ Trial Ex. No. 41, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Sept. 16, 1996) (not under seal).

12. Transcripts of Hearing at 88, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Oct. 2, 1996) (not under seal).

tarily returned to GP.¹³ The remaining ninety-seven inmates voluntarily agreed to be transferred to GP.¹⁴

Appointment of Counsel

After the Special Review Committee's recommendations were finalized, more than 170 PS inmates reclassified to GP filed individual actions in federal court seeking to enjoin DOC's decision to return them to GP.¹⁵ Thus, the federal court faced the prospect of dealing with scores of individual lawsuits concerning the proposed transfer of inmates. The U.S. Attorney's Office, which had been asked to look at the cases by the Department of Justice, approached the law firm of Osborn Maledon about representing the inmates on a pro bono basis.¹⁶ Osborn Maledon then found a group of four other lawyers—all of whom were solo practitioners or worked in small firms—who agreed, along with Osborn Maledon, to represent the PS class on a pro bono basis. The court appointed Osborn Maledon and the other attorneys as counsel for the PS inmates in December 1995.¹⁷

Litigation History

The Class Action

Counsel filed the class action in February 1996, and the court then stayed the individual inmate cases.¹⁸ In April 1996, district court Judge Charles Hardy certified the class, which consisted of all PS inmates who had been either reclassified by the Special Review Committee or subsequently reclassified by

13. Of the 463 inmates reviewed, at least 222 had gang-related problems. Of these 222 inmates, the Special Review Committee recommended that 164 be returned to GP. See Memorandum Opinion and Order at 10, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Dec. 6, 1996) (not under seal).

14. Plaintiffs' Hearing Memorandum at 3, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Feb. 13, 1998) (under seal).

15. Order, (*Doe*) v. *Savage*, CIV 95-1101-PHX-CLH (D. Ariz. Dec. 21, 1995) (under seal).

16. Osborn Maledon, at the time a firm of twenty-six lawyers, includes pro bono representation in its yearly budget numbers and the firm had previously handled a number of other pro bono cases.

17. Order, (*Doe*) v. *Lewis*, CIV 95-2473-PHX-CLH (D. Ariz. Dec. 21, 1995) (under seal).

18. Class Action Complaint, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Feb. 22, 1996) (under seal); Order, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Apr. 18, 1996) (under seal).

the normal review process at DOC, and had not signed a court-approved waiver agreeing to leave PS.¹⁹ As framed by Judge Hardy, the Eighth Amendment issue in the case was whether DOC was deliberately indifferent to serious risks of harm by transferring PS inmates to GP, given the attitudes and perceptions of GP inmates toward those who had been in PS.²⁰

The Intervening Decision in Lewis v. Casey

During the months before the trial, Plaintiffs' counsel confronted the teachings of a case decided that summer by the Supreme Court: *Lewis v. Casey*.²¹ That case, which overturned a Ninth Circuit prison civil rights case from Arizona, made very clear that class-wide relief would not be possible without very substantive proof that the conditions claimed to be constitutionally problematic affected the entire class of PS inmates.²² It was evident to Plaintiffs' counsel that if they were going to sustain their case in the post-*Lewis v. Casey* world, they would need to produce testimony from a large number of inmates, prison officials, and experts on prison violence.

The Passage of the PLRA

The Prison Litigation Reform Act (PLRA)²³ took effect in April 1996. Plaintiffs' counsel, of course, had agreed to take the case five months before the PLRA was passed. Among other things, the PLRA limited the attorneys' fees Plaintiffs' counsel could recover to an hourly rate no greater than 150% of the rate paid in each federal district to court-appointed counsel.²⁴ Although Plaintiffs' counsel never saw this as a fee-generating case, they had undertaken the case representation assuming

19. Order, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Apr. 18, 1996) (under seal).

20. *Id.*; see *Brennan v. Farmer*, 511 U.S. 825 (1994) ("hold[ing] that a prison official may be held liable under the Eighth Amendment for denying human conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").

21. 518 U.S. 350 (1996).

22. See *Lewis*, 518 U.S. at 357.

23. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

24. 42 U.S.C. § 1997e(d) (2004).

that if Plaintiffs were successful, they would be compensated like other lawyers representing a successful § 1983 litigant. Ultimately, the Ninth Circuit held that the PLRA rate cap applied to work performed after the enactment of the PLRA, even if the case was filed before its enactment.²⁵ As a result, Plaintiffs' counsel was paid at the PLRA rate (\$112.50 in Arizona) from April 1996 through the end of the case.²⁶

The First Evidentiary Hearing

Discovery occurred over the next several months. Plaintiffs' counsel devoted substantial time to preparing inmate testimony and deposing and examining witnesses because they felt such activity would be paramount to the ultimate resolution of the case.

An initial settlement conference was conducted in August 1996, but proved unsuccessful.²⁷ The injunction hearing began on September 16, 1996, before Judge Hardy. The issue was tried, under seal, over a span of nineteen trial days, with a total of fifty-one witnesses and 176 exhibits.²⁸

Numerous witnesses—including DOC officials—testified that gang members were housed on every yard in the DOC system.²⁹ Gang members posed extreme risks to PS inmates. Gang members typically engage in illegal activities on the yard—bartering “store” items, selling drugs, gambling, and extortion—just to name a few. PS inmates are viewed as “snitches,” and no gang member wants an inmate around who will “snitch” on his “gig.”

The gangs in the DOC system included the Aryan Brotherhood (AB), Old Mexican Mafia (Old EME) and New Mexican Mafia (New EME), Border Brothers (composed of inmates of Mexican National origin), American African Council and Mau-Mau's (both black gangs), Warrior Society (a Native American gang), and a variety of other street gangs, such as the Crips and

25. *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998).

26. Total fees and costs paid to Plaintiffs' counsel in this case were over \$1,700,000.

27. *Order, Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. June 4, 1996) (not under seal).

28. *Transcripts of Hearing, Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 16-20, 23-27, 30, Oct. 1-3, 16-17, 31, Nov. 1 & 4, 1996) (portions under seal).

29. *Id.*

the Bloods, and the Grandels (composed of Hispanics affiliated with street gangs in Glendale, Arizona).³⁰

The AB and EME were the two most prominent gangs. The AB has a “blood in, blood out” code for membership. This means that an inmate must “draw blood” (typically by assaulting or stabbing someone) before he can be admitted as a “patched” member.³¹ In addition to patched members, however, there are various other individuals associated with the AB: “probates” have been accepted as candidates for membership, but have not yet performed the acts necessary to become patched; “wannabes” would like to be considered for membership and tend to curry favor with the gangs; and “associates,” usually independent “tough guys” who will simply do the bidding of the AB.³²

Because PS inmates are often those least able to defend themselves, they are easy targets for “probates” wanting to earn their “patch,” and wannabes and associates who simply want to stay in the gang’s good graces.³³

A Deputy Warden of one of DOC’s maximum security units testified at the September hearing that he believed there were about 300 actual members of the AB, New EME and Old EME in the system, as well as another 2,400-3,000 “associates” and

30. *Id.*; Plaintiffs’ Hearing Memorandum at 6, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Feb. 13, 1998) (under seal).

31. See Transcripts of Hearing at 117-18, 153, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 20, 1996) (under seal); Transcripts of Hearing at 15, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 25, 1996) (under seal); Transcripts of Hearing at 179-80, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 26, 1996) (not under seal); Transcripts of Hearing at 69, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Oct. 1, 1996) (not under seal); Transcripts of Hearing at 10, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Oct. 3, 1996) (not under seal); see also Plaintiffs’ Hearing Memorandum at 6-7, *Does v. Stewart*, No. CIV96-0486-PHX-CLH (D. Ariz. Feb. 13, 1998) (under seal).

32. Transcripts of Hearing at 57-68, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 18, 1996) (not under seal).

33. As the court noted in its April 24, 1996, order,

Based on the evidence, including testimony from over thirty current and former inmates, at least fourteen of whom testified specifically to dangers faced at the maximum security units (levels four and five), not to mention more than a dozen DOC officials, the Court also found that gangs were pervasive throughout the system and that “gangs in the higher security level units readily resort to violence to enforce their will.”

Order at 5, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Apr. 24, 1996) (not under seal).

“wannabes” of these gangs.³⁴ The Deputy Warden also estimated that 40-50% of the detainees in the largest Phoenix metropolitan-area jail—the Maricopa County Jail—had some gang affiliation.³⁵ A large part of that population wound up moving into the DOC system. In fact, at the time of the hearing, DOC was receiving approximately 8,000 new inmates each year.³⁶ Using the Deputy Warden’s math, approximately 3,200-4,000 new gang affiliates entered the DOC system every year.

In August 1995, approximately a year before the hearing, DOC had implemented what it referred to as its Security Threat Group (STG) policy. Under the policy, gangs are designated as “Security Threat Groups.”³⁷ At the time of the hearing, DOC had validated (i.e., officially recognized) three gangs: the AB, Old EME and New EME.³⁸ Once gangs are designated as STGs, the policy then provided a mechanism for DOC to validate active members of these gangs. If “validated,” a gang member can then be permanently sent to maximum security, with resulting “24/7” lockdown and loss of privileges and visitation rights.³⁹

At the time of the 1996 hearing, DOC had validated approximately thirty STG members.⁴⁰ The Plaintiffs argued that thirty validated gang members was only a “drop in the bucket” of the potential 7,000 gang members, probates, associates and wannabes within the DOC system.⁴¹

Testimony at the hearing about the presence of gangs at maximum level four and five facilities, and the resulting danger to PS inmates, was extensive. For instance, one PS inmate—

34. Transcripts of Hearing at 114-15, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Oct. 16, 1996) (not under seal) (these numbers, of course, did not include members of the other gangs within the prison system).

35. *Id.* at 108-10.

36. *Id.* at 52-53.

37. ARIZONA DEP’T OF CORR., DEPARTMENT ORDER MANUAL, DEPARTMENT ORDER 806 (1995) [hereinafter DEPARTMENT ORDER MANUAL].

38. DOC has now validated five more gangs—the Border Brothers, the Grandels, the Surenos (Southern California Hispanics), the Mau-Mau’s and the Warrior Society. Ariz. Dep’t of Corr., Security Threat Groups, *available at* <http://www.adc.state.az.us/STG/STGMenu.htm> (last visited Aug. 19, 2004).

39. See DEPARTMENT ORDER MANUAL, *supra* note 37.

40. Memorandum Opinion and Order at 5, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Dec. 6, 1996) (not under seal).

41. *Id.*

formerly an AB member—testified that he “ran” the yards at Perryville and Winslow while he was in GP. He personally extorted former PS inmates, asked others to extort them, and assaulted the former PS inmates to “run them off” the yard.⁴²

Another PS inmate testified that he was convicted of child molestation. After he saw inmates passing around a copy of the legal opinion in his case while he was in GP, an AB member assaulted him on the athletic field, while hundreds of other inmates watched. He sustained a bruised jaw, broken lip, chipped tooth and loss of hearing in one ear.⁴³ At the time of the incident, the PS inmate was housed at a level five maximum-security facility.⁴⁴

Judge Hardy’s 1996 Ruling

On December 6, 1996, Judge Hardy issued his opinion. In sum, he found that PS inmates housed in level four and five units faced substantial risks of serious harm if they were transferred to GP; and that DOC, with knowledge of such risks, had been deliberately indifferent in reclassifying these inmates to GP.⁴⁵ With respect to PS inmates housed in medium and low security units (levels two and three), Judge Hardy ruled that Plaintiffs had not shown that these inmates, as a class, faced substantial risks of serious harm if transferred to GP yards simply as a result of their status as PS inmates.⁴⁶ Judge Hardy held, however, that an individual inmate housed in a level two or three facility could still attempt to establish in his individual action that he would face a substantial risk of harm if he was returned to GP.⁴⁷ Judge Hardy also preliminarily enjoined all proposed transfers to GP pending final judgment.⁴⁸

42. Transcripts of Hearing at 124-27, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 20, 1996) (under seal). Because the inmate had “given up” an AB probate in connection with his plea bargain, there was an AB contract on his life. Nonetheless, the Special Review Committee had reclassified him to GP.

43. *Id.* at 123-27.

44. *Id.*

45. Memorandum Opinion and Order at 13, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Dec. 6, 1996) (not under seal).

46. *Id.* at 13-14.

47. *Id.* at 14.

48. Order at 3, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Dec. 24, 1996) (not under seal).

Director Stewart's Press Release

The parties stipulated in early May 1996 that the case should be sealed because publicity that was likely to be generated at the hearing might adversely affect the Plaintiffs, and on May 6, 1996, the court ordered that the case be sealed.⁴⁹ Particular care was taken during trial to ensure that the case remain sealed and that no information be disseminated that could ultimately harm Plaintiffs. For instance, no inmates were permitted to be present in the courtroom during the testimony of other inmates.⁵⁰ The court admonished DOC personnel that the case was sealed and testimony was not to be repeated to anyone.⁵¹ In fact, on one particular trial day, the court asked a college professor observing the proceedings to leave the courtroom because the case was sealed.⁵²

On December 23, 1996, however, DOC issued a press release about the court's December 6th order.⁵³ That same day, the Associated Press (AP) transmitted the story on the AP wire to its fourteen television, radio and print members throughout Arizona.⁵⁴ The next day, an article appeared in *The Arizona Republic*, a Phoenix newspaper with the largest circulation in Arizona.⁵⁵ The article was highly critical of the court for interfering with DOC. The article explained that PS inmates were those with "jailhouse enemies" and included "convicted police officers, child molesters and inmates who had informed or testified against fellow inmates."⁵⁶ The article also disclosed that the court had ruled that PS inmates in lower-security units

49. Order, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. May 6, 1996) (not under seal).

50. Transcripts of Hearing, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 16-20, 23-27, 30, Oct. 1-3, 16-17, 31, Nov. 1 & 4, 1996) (portions under seal).

51. Transcripts of Hearing at 177-79, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 20, 1996) (not under seal).

52. Transcripts of Hearing at 19-23, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Sept. 24, 1996) (not under seal).

53. Press Release, Ariz. Dep't of Corr., Another Federal Court Ruling Intrudes on Prison Management (Dec. 23, 1996) [hereinafter *Another Federal Court Ruling*].

54. Plaintiffs' Supplement to Alter or Amend Judgment, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Jan. 3, 1997) (not under seal).

55. Norm Parish, *Prisons Chief to Appeal Protective-Custody Order*, ARIZ. REPUBLIC, Dec. 24, 1996, at B2.

56. *Id.*

could be transferred to GP.⁵⁷ A Tucson paper ran a similar story the same day.⁵⁸

DOC's press release did not, of course, identify any PS inmates by name.⁵⁹ DOC's then-director attempted to justify his press release by pointing to a provision in the court's December 6th Order that required DOC to place the order in prison libraries. According to the director, this provision meant that the terms of the order were no longer confidential.⁶⁰ In fact, however, after the December 6th Order, Plaintiffs' counsel requested that the order not be placed in the prison libraries, and the court issued an order to that effect on December 11.⁶¹

Although Plaintiffs' counsel believed that this press release was a direct violation of the confidentiality provisions in effect at that time in the case, the court never issued a ruling to that effect. Plaintiffs' counsel were able, however, to argue at a later hearing before Judge Bilby that the new press coverage increased the very substantial risk of serious injury faced by PS inmates who might be transferred to GP yards.⁶²

Judge Hardy's 1997 Opinion

The parties then filed various post trial motions. In response, Judge Hardy issued a second opinion and order on April 24, 1997, which ultimately proved to be much stronger in terms of the court's support for his initial findings that PS inmates were subject to a substantial risk of harm at level four and five

57. *Id.*

58. David Pittman, *Protective-Custody Ruling Irks Arizona Prisons Boss*, TUCSON CITIZEN, Dec. 24, 1996, at 1B.

59. *See Another Federal Court Ruling*, *supra* note 53.

60. *Id.*

61. Order, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Dec. 12, 1996) (not under seal).

62. Transcript of Hearing at 62-83, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Feb. 19, 1998) (under seal).

units⁶³ and that DOC had been deliberately indifferent to these risks.⁶⁴

Judge Hardy held, however, that DOC was entitled to draft a remedial plan “in harmony” with the court’s findings on these issues before the court issued a permanent injunction.⁶⁵ The court, therefore, dissolved the permanent injunction it issued on December 6, 1996, and gave DOC an opportunity to devise a plan “consistent with the findings and conclusions of the Court concerning the transfer of [PS] inmates back to [GP] at level four and five units.”⁶⁶ The court specifically ordered DOC to outline how it intended to protect PS inmates transferred to a level four or five unit from the substantial risk of harm that the court had found to exist.⁶⁷

Finally, the court, with DOC’s acquiescence, entered an interim injunction enjoining DOC from moving any PS inmates to level four and five units until the court ruled on DOC’s proposed plan.⁶⁸ In addition, the court stayed the individual actions filed by class members pending a ruling on DOC’s proposed plan.⁶⁹ That portion of Judge Hardy’s December 6 ruling that enjoined DOC from moving a PS inmate to a level two or three unit until

63. The order provided,

The pervasiveness of the gangs, the violent tendencies of gang members, probates and wannabes and the particular hostility toward [PS] inmates due simply to [PS] status, lead the Court to conclude that any [PS] inmate returned to level four or five [GP] inmates from [PS] faced a substantial risk of harm.

Order at 6, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Apr. 24, 1997) (not under seal).

64. Finding,

[Other facts], together with the knowledge by DOC officials that inmates were stigmatized simply due to [PS] status, that gangs were particularly hostile to [PS] inmates, that gangs were pervasive, most particularly, in maximum security units, and that many inmates slated for return from [PS] to [GP] at these units were originally placed in [PS] because of gang issues, all point to DOC’s knowledge of a substantial risk of harm faced by [PS] inmates if returned to [GP] at the maximum level units.

Id. at 7.

65. *Id.* at 12-13.

66. *Id.* at 13.

67. *Id.* at 17-18.

68. Order at 17-18, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Apr. 24, 1997) (not under seal).

69. *Id.* at 17.

the inmate had a hearing in his individual action remained in effect.

1997-1998 Events

DOC's Proposed Plan

DOC submitted its proposed plan on July 1, 1997. As part of its plan, DOC revised its STG policy, designed to remove gang members from GP.⁷⁰ In addition, DOC also revised its PS policy with respect to the factors PS committees were to consider before returning a PS inmate to GP.⁷¹ Under the revised policy, PS committees were to consider that prior placement in PS *could* affect an inmate's ability to successfully integrate into GP.⁷²

In a "Supplemental Notice," also filed on July 1, 1997, DOC outlined two additional policy revisions in support of its proposed plan. First, DOC agreed not to transfer any PS inmate back to his GP unit of origin.⁷³ In addition, DOC proposed to route PS inmates being transferred to GP through its Alhambra Receiving Center wearing the same orange jumpsuit uniform worn by all new arrivals—in an effort to disguise the fact that these inmates were former PS inmates.⁷⁴

Reassignment of the Case to Judge Bilby

The case was reassigned to a very experienced judge in Tucson in late 1997.⁷⁵ His name was Richard Bilby. He brought to the case a well-earned reputation as a judge who could manage a complex class action efficiently. He also had considerable experience with DOC; he had been to various DOC facilities; and he had presided over a number of high-profile conditions-of-confinement cases. From the very outset of his in-

70. Defendant's Proposed Plan For Movement Of Level 4 and 5 Protective Segregation Inmates Into General Population Ex. A, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. July 1, 1997) (not under seal).

71. *Id.* at 2-3.

72. *Id.* at 4.

73. Supplemental Notice Regarding Protective Segregation Issues within the Arizona Department of Corrections at 3, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. July 1, 1997) (not under seal).

74. *Id.*

75. Order at 1, *Does v. Stewart*, CIV 96-0486-PHX-CLH (D. Ariz. Aug. 4, 1997) (under seal).

volvement in the case, it became evident that this case would receive his full consideration.⁷⁶

The Benitez Murder and its Consequences

In late January 1998—less than a month before the hearing before Judge Bilby—a former PS inmate was stabbed to death in a general population unit.⁷⁷ The inmate, a former New EME member, had originally been placed in PS in 1991 after DOC learned that the New EME had placed a “contract” on his life.⁷⁸ Following his release in 1996, the inmate was re-incarcerated in December 1997, after he violated parole.⁷⁹ He was placed in a GP unit despite his documented history of verified protection/safety issues.⁸⁰ Less than a month later, the inmate was stabbed to death in his cell, allegedly at the direction of the New EME.⁸¹

In a subsequent civil action, DOC took full responsibility for its mistake in sending the inmate to GP.⁸² In the days leading up to the second hearing, however, DOC refused to produce any of its investigative reports about the inmate’s death on the basis that his death had occurred after the close of discovery.⁸³ In hindsight, the timing of this inmate’s tragic death certainly changed the complexion of the case and brought into stark real-

76. After presiding over the next round of hearings in the case and issuing his opinion, Judge Bilby died suddenly and unexpectedly. He is remembered as one of the finest judges to have served the Federal Court in Arizona. In late 1998, Presiding Judge Broomfield assigned the case to Judge William Fremming Nielson, a federal district judge from Spokane, Washington.

77. Ariz. Dep’t of Corr., Information Report No. 98-C020290 (Jan. 25, 1998); Ariz. Dep’t of Corr., Significant Incident Report No. 98-0241 (Jan. 25, 1998) (documents under seal).

78. Ariz. Dep’t of Corr., Reclassification Score Sheet on Steve Benitez (Apr 10, 1991) (under seal).

79. Disposition Hearing Probation Revoked-Imprisonment, State v. Benitez, CR 97-07667 (Nov. 19, 1997); Ariz. Dep’t of Corr., Summary Admission Report on Steve Benitez (Dec. 1, 1997) (documents under seal).

80. Ariz. Dep’t of Corr., Initial Classification Score Sheet on Steve Benitez (Dec. 1, 1997) (under seal).

81. *Supra* note 77.

82. In May 1998, Mary Benitez on behalf of the statutory beneficiaries of Steve Benitez, filed a notice of claim pursuant to ARIZ. REV. STAT. § 12-821.01 (1994), against the State of Arizona, the Department of Corrections and others. This matter was eventually settled by the parties.

83. Judge Bilby did require DOC to produce all such documents.

ity the potential dangers faced by former PS inmates transferred to GP.

The Second Evidentiary Hearing

A second evidentiary hearing was held before Judge Bilby in February 1998. The purpose of this hearing was to determine the sufficiency of DOC's proposed remedial plan.⁸⁴ The stories about continued assaults on inmates in need of protection had accumulated and a number of inmates expressed a willingness to come forward to talk about them. Their stories of victimization were augmented by the testimony of former leaders of the AB who were willing to provide testimony.⁸⁵

Five inmates testified that they had either been assaulted or "run off" medium and high-security yards.⁸⁶ One inmate, for example, had gang issues because his family had refused to help individuals smuggle drugs into prison for the AB. Although he was placed into PS after this incident, he had waived out of PS so he could take college and vocational classes not available in PS. Six days after he was transferred back to GP, masked inmates attacked him with socks filled with padlocks. Although the inmate identified three of his attackers who were known AB associates, DOC refused to reclass the inmate to PS because "he had no warranted issues."⁸⁷ As the inmate was describing his hearing before the reclassification committee, Judge Bilby asked rhetorically: "What did they say about the fact they had beat the hell out of you?"⁸⁸

Former gang members also testified. DOC placed one inmate, a former AB member, into PS after he renounced his association with the AB. He testified about the risks faced by PS inmates in the general prison environment and why prison

84. Transcript of Hearing at 3, *Does v. Stewart*, CIV 96-0486-PHX-RMB (D. Ariz. Feb. 18, 1998) (under seal).

85. Transcript of Hearing at 184-246, *Does v. Stewart*, CVI 96-0486-PHX-RMB (D. Ariz. Feb. 19, 1998) (under seal).

86. Transcript of Hearing at 16, *Does v. Stewart*, CVI 96-0486-PHX-RMB (D. Ariz. Feb. 20, 1998) (under seal).

87. *Id.* at 245-47.

88. *Id.*

gangs, including the AB, were able to continue to exert influence on yards throughout the state.⁸⁹

A second former member of the AB chronicled the attitudes of not only members of the AB, but members of the general population toward PS inmates, reaffirming the attitudes and risks that were documented during the prior hearing. He also disclosed that the AB had obtained a list of PS inmates involved in the lawsuit and circulated this list throughout the units in the state, underscoring the safety risks to PS inmates.⁹⁰

Plaintiffs' counsel were also able to establish that PS inmates would be particularly vulnerable if transferred to GP because DOC failed to take measures to protect their identities.⁹¹ In one exchange, Plaintiffs' counsel asked DOC's then-director whether DOC provided the classification status of PS inmates in response to telephone inquiries. The director denied that such information was ever given out.⁹² At that point, Judge Bilby unilaterally decided that the parties should place a telephone call to DOC in open court and ask about the whereabouts of one of the class representatives in the courtroom.⁹³ The courtroom phone was placed on speaker and Judge Bilby directed Plaintiffs' counsel to place the call without identifying himself. The DOC employee who answered the phone not only identified the inmate as a PS inmate, but provided his crime, his exact unit location, and told Plaintiffs' counsel that the inmate was out of the unit that day because he was attending a court hearing in Tucson.⁹⁴

In addition, DOC witnesses admitted that little had changed within the DOC system since the fall of 1996, except

89. Transcript of Hearing at 184-246, *Does v. Stewart*, CVI 96-0486-PHX-RMB (D. Ariz. Feb. 19, 1998) (under seal).

90. Videotaped deposition of (John Doe) at 26-60, *Does v. Stewart*, CIV 96-0486-PHX-RMB (D. Ariz. Feb. 10, 1998) (under seal).

91. Transcript of Hearing, *Does v. Stewart*, CIV 96-0486-PHX-RMB (D. Ariz. Feb. 18-20, 1998) (under seal).

92. Transcript of Hearing at 90-92, *Does v. Stewart*, CVI 96-0486-PHX-RMB (D. Ariz. Feb. 19, 1998) (under seal).

93. Plaintiffs' counsel had placed several calls to DOC before trial asking about the status of PS inmates and were fairly confident that such information was being provided to the public. However, unplanned, live trial demonstrations are always risky.

94. Transcript of Hearing at 92-97, *Does v. Stewart*, CVI 96-0486-PHX-RMB (D. Ariz. Feb. 19, 1998) (under seal).

that a number of additional gang members had been segregated. The major prison gangs were still found in every unit throughout the state, and the raw numbers of inmates associated with gangs had actually increased since then.⁹⁵

Settlement and Monitoring

Settlement of the Case

During the course of the proceedings before Judge Bilby, it became clear to DOC's counsel that Bilby was unlikely to approve DOC's proposed plan. Near the conclusion of those proceedings, DOC requested Judge Bilby to stay his ruling on the case in order to allow DOC an opportunity to develop a more effective plan.⁹⁶ The parties ultimately reached a stipulated stay and interim agreement.⁹⁷

The agreement provided that the class action would be stayed for up to two years, or until DOC submitted another plan for court approval.⁹⁸ In the interim, DOC agreed that it would not involuntarily transfer any PS inmate to GP, including those PS inmates classified to medium or low security units.⁹⁹ Pursuant to that agreement, on March 2, 1998, Judge Bilby entered an order staying the proceedings.¹⁰⁰

The 1998 Election and the Change in Attorney General

Relationships between counsel always seem to become an important ingredient in the way in which all lengthy litigation

95. Transcript of Hearing at 98-109, *Does v. Stewart*, CIV 96-0486-PHX-RMB (D. Ariz. Feb. 18, 1998) (under seal).

96. Transcript of Hearing at 266-75, *Does v. Stewart*, CIV 96-0486-PHX-RMB (D. Ariz. Feb. 20, 1998) (under seal).

97. Stipulation to Stay, *Does v. Stewart*, CIV 96-0486-PHX-RMB (D. Ariz. Feb. 27, 1998) (not under seal).

98. *Id.*

99. *Id.*

100. Once the action was stayed, Plaintiffs' counsel sent a letter explaining the stay order to all class members. In addition, counsel personally visited all five units around the state where PS inmates were housed and met with the PS inmates to explain the ruling and its effect. Plaintiffs' counsel continued to meet and communicate with the PS inmates throughout the next four and a half years of the case. In the view of Plaintiffs' counsel, direct and immediate communication with all of the members of the class was an important element in creating the environment of trust with PS inmates that ultimately resulted in general approval of the case's dismissal.

unfolds. This case was no different. In the very early years of the case, relationships were relatively harmonious, but as the first hearing came to an end, relationships between Plaintiffs' counsel and the Office of the Attorney General, which represented DOC, began to deteriorate. Over a several month span, countless telephone and written communications from Plaintiffs' counsel were ignored and went unanswered.¹⁰¹

In 1998, a new Attorney General, Janet Napolitano, was elected.¹⁰² Plaintiffs' counsel sought an opportunity to meet with the new Attorney General's representatives to discuss communication issues. In preparation for that meeting, Plaintiffs' counsel prepared a chart identifying each of the more than sixty unanswered written communications addressed to the Office of the Attorney General.¹⁰³ Very promptly following the meeting, the Attorney General's office assigned a new lead attorney to the case.¹⁰⁴ At approximately the same time, two new high-ranking DOC officials became the agency's chief representatives in the litigation.¹⁰⁵ These personnel changes seemed to alter the chemistry between the parties. All counsel agree that the improved communications paved the way for the eventual amicable resolution of the case—a resolution that may never have been possible had those lines of communication not been re-established.

DOC's Decision to Make the Resolution of the Case an Opportunity to Create an Innovative Protective Segregation Policy

Together, DOC's new counsel and agency representatives worked on a new remedial plan that they filed on February 10,

101. Plaintiffs' counsel would contact the Office of the Attorney General if they received letters from inmates which they believed needed further investigation or explanation.

102. In 2002, Attorney General Napolitano was elected Governor of Arizona.

103. Chart prepared by Rebecca Garner, paralegal assistant at Osborn Maledon, P.A., (Feb. 8, 1999).

104. The case was re-assigned to Assistant Attorney General Bruce Skolnik.

105. DOC's chief representatives were Charles R. Ryan, the Deputy Director for Prison Operations, and Donna Clement, Administrator of its Offender Services Bureau.

2000.¹⁰⁶ Prior to its filing, DOC's then-director made a number of highly publicized statements that he wanted DOC to have the best and most advanced PS system in the nation.¹⁰⁷ While this presented DOC's counsel and policy drafters with a formidable challenge, it also presented an opportunity not to be missed.

To assist it in drafting the plan, DOC retained the services of Richard Phillips, a retired Federal Bureau of Prisons official who co-authored the authoritative text on how to design a PS system and manage a PS population. In his report and testimony, Charles Montgomery, the court's own expert, repeatedly referred to Phillips' work as definitive. As a show of good-faith, DOC allowed Plaintiffs' counsel to informally interview Phillips and share their suggestions and concerns with him.¹⁰⁸

DOC's February 2000 revised remedial plan contained three main elements. First, DOC totally revamped its policies and procedures on PS eligibility and transfers out of PS. DOC's new procedures provided multiple layers of review, dedicated substantial investigative resources, assigned PS coordinators at both the unit and central office levels, and allowed inmates to both present evidence and file appeals.¹⁰⁹ Many observers have commented that DOC's new comprehensive procedures serve as a model for modern corrections.¹¹⁰ Second, DOC improved conditions of confinement for PS inmates to mirror those of similarly classified GP inmates.¹¹¹ In the past, while DOC's

106. Notice of Filing—Proposed Remedial Plan by the Arizona Department of Corrections Re: Protective Segregation Issues, *Does v. Stewart*, CIV 96-0486-WFN (D. Ariz. Feb. 10, 2000).

107. Terry Stewart, *Standing Guard*, PHOENIX MAG. July 1998, at 16; Jon Burstein, *Prisons Relocating Gangsters 5 of State's 'Top 10' Sent to Other States*, ARIZ. DAILY STAR, June 8, 1999, at A1.

108. E-mail from Larry Hammond, Attorney, Osborn Maledon, P.A., to Debbie Hill, Timothy Eckstein, Tom Spangler, Lori Dickman and Donna Seger, Attorneys, Paralegals and Secretary, Osborn Maledon, P.A. (Jan. 14, 2000, 15:17 MST) (privileged document); Memorandum from Larry Hammond, to DOC Team (Jan. 26, 2000) (privileged document).

109. Notice of Filing—Proposed Remedial Plan by the Arizona Department of Corrections Re: Protective Segregation Issues at 20-32, *Does v. Stewart*, CIV 96-0486-WFN (D. Ariz. Feb. 10, 2000).

110. DOC received favorable comments and inquiries from correctional departments in Connecticut, Georgia, Illinois, Indiana, and New Mexico.

111. Notice of Filing—Proposed Remedial Plan by the Arizona Department of Corrections Re: Protective Segregation Issues at 32-43, *Does v. Stewart*, CIV 96-0486-WFN (D. Ariz. Feb. 10, 2000).

confinement of PS inmates in close-custody afforded maximum security, it had the effect of treating PS inmates in a manner similar to those who had committed disciplinary infractions. Finally, DOC adopted a number of systemic security enhancements. These included more vigorous enforcement of its STG identification and segregation policies, and establishment of sex offender-specific housing units to lessen the vulnerability of some of DOC's most reviled inmates.¹¹²

Selection of a Court Monitor

The parties agreed that DOC's revised plan, if implemented as written, would remediate the constitutional violations found by the court.¹¹³ They also agreed that DOC's compliance should be monitored by a neutral court-appointee.¹¹⁴ DOC provided an initial list of six proposed candidates. Plaintiffs' counsel then contacted a number of other sources for potential candidates, including the ACLU Prison Project, the Department of Justice, Southern Poverty Law Center, lawyers in other prison class actions, and other experienced court monitors. After extensive discussions with these groups and potential candidates, Plaintiffs' counsel submitted their own list. Much to the surprise of Plaintiffs' counsel, DOC agreed to one of them—Steve J. Martin, an attorney who had been the former General Counsel for the Texas Department of Corrections and had considerable experience as a court monitor and as an expert for the U.S. Department of Justice, as well as extensive experience as an expert for both plaintiffs and defendants in class action prison-conditions litigation.¹¹⁵ Plaintiffs' counsel viewed Martin as high on their list, but thought there was little likelihood that DOC would agree to him.

From DOC's perspective, on the other hand, Martin was a natural choice. Rather than an academic, DOC was specifically seeking a candidate with a correctional background to monitor its performance with the highly operational remedial plan. The

112. *Id.* at 43-57.

113. *Supra* note 108.

114. *Id.*

115. See Joint Motion for Conditional Dismissal and Appointment of a Monitor, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. July 13, 2000) (under seal) (listing curriculum vitae of Steve J. Martin as of January 2000).

fact that Martin started his career as a correctional officer and then became chief legal advisor to a large prison system gave DOC comfort that he would be sensitive to the practicalities of managing a sub-population of prisoners who, as a class, presented difficult challenges to management.¹¹⁶ In addition, DOC's expert in this case had jointly monitored a remedial order in another state with Martin, and he recommended Martin to DOC officials.¹¹⁷ In short, despite Plaintiffs' surprise that DOC found Martin acceptable, DOC believed his appointment would serve its interests equally well.

In June 2000—after the parties tentatively agreed on Martin for the monitoring role, but prior to his formal appointment—Martin met informally with DOC officials and visited a number of prisons housing significant PS populations.¹¹⁸ DOC even facilitated a working session between Martin and its PS administrator and committee members to allow Martin to conduct a sizeable number of PS file reviews.¹¹⁹ Martin thereafter met with Plaintiffs' counsel, followed by a joint meeting with the parties.¹²⁰

In July 2000, the parties filed a joint stipulation agreeing to conditionally dismiss the case subject to DOC's substantial compliance with its proposed plan.¹²¹ The parties simultaneously filed a Settlement Agreement (Agreement) that specified Martin's duties and powers as court monitor.¹²² The Agreement was a product of negotiations between the parties that included

116. Martin's career in corrections started in 1972, when he served as a correctional officer for the Texas Department of Criminal Justice—Institutional Division (TDCJ-ID). He was also employed as a federal probation and parole officer. After graduating from law school, Martin rose up through the ranks to become TDCJ-ID's General Counsel and Chief of Staff to its Director.

117. DOC's expert was Gary W. DeLand, former Executive Director of the Utah State Department of Corrections. Martin and DeLand were appointed by the court to serve as co-monitors in *United State v. Montana*, CV94-90-H-CCL (D. Mont. 1994).

118. First Report of the Monitor Prepared Pursuant to the Settlement Agreement at 2-3, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. Dec. 8, 2000) (under seal).

119. *Id.*

120. *Id.*

121. Joint Motion for Conditional Dismissal and Appointment of a Monitor, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. July 13, 2000) (under seal).

122. *Id.* at Ex. A.

Martin's input on the monitoring process.¹²³ Those terms, among other things, allowed Martin to make announced or unannounced visits to all facilities and headquarters offices; provided access to inmate and/or other files, records, and data; and permitted unimpeded access to speak with inmates and DOC personnel.¹²⁴ The Agreement also allowed Martin to attend meetings at prison facilities and/or central headquarters that dealt with issues pertaining to PS inmates.¹²⁵ DOC was required to routinely submit data on the PS population that Martin had identified during his pre-monitoring visit.¹²⁶ Finally, DOC agreed to pay the monitor's fees and costs. The monitoring term was set to begin on September 1, 2000, and was to continue for eighteen months.¹²⁷ However, the Agreement contained an "early-out" provision wherein the court monitor could, after twelve months, recommend termination upon a finding of substantial compliance and a concomitant finding of a "reasonable expectancy that such substantial compliance will continue indefinitely into the future."¹²⁸

Monitoring Process

The Agreement required the court monitor to file quarterly reports with the court on DOC's compliance with the plan, and also allowed him to make recommendations regarding compliance.¹²⁹ Because DOC and its attorney intended to take full advantage of the "early-out" provision of the Agreement, the parties agreed that the court monitor would conduct a full-scale site inspection prior to the formal September 1, 2000, monitoring start date, so that his first quarterly report would be as substantive as possible.¹³⁰ This turned out to be a very wise move as the first report contained a series of specific recommenda-

123. *Id.*

124. *Id.* at 3-4.

125. *Id.*

126. Joint Motion for Conditional Dismissal and Appointment of a Monitor at 4, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. July 13, 2000) (under seal).

127. *Id.*

128. *Id.* at 4-5.

129. *Id.* at 5.

130. E-mail from Steve J. Martin, court-appointed monitor, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz.), to Debbie Hill, Attorney, Osborn Maledon, P.A. (Aug. 3, 2000, 13:43 MST) (on file with author).

tions that enabled DOC to further fine-tune its policies and procedures governing the administration of PS inmates.¹³¹

By the third report, nine months into the monitoring term, the court monitor noted the possibility that DOC's compliance could very well provide a basis to recommend that active monitoring be terminated prior to the eighteen month term.¹³² During this period, DOC moved swiftly to implement a pilot project intended to streamline the process of reviewing PS placements by permitting facility personnel more discretion on such placements.¹³³ The manner in which the pilot project began and was implemented typified DOC's relationship with the court monitor. DOC allowed the court monitor to develop very functional working relationships with its personnel, both at the facility and central headquarters levels.¹³⁴ DOC vigorously facilitated and endorsed the monitor's operational contacts with DOC personnel.¹³⁵ As a result, the monitor was viewed more as a co-equal corrections professional facilitating compliance efforts, than an outsider intrusively directing compliance. Plaintiffs' counsel were aware of the working relationships the monitor had developed, and as a consequence, had heightened confidence in the monitoring process.

The monitor's fourth report contained a proposed finding that DOC was in substantial compliance with the plan and recommended that the court dismiss the lawsuit three months prior to the full eighteen month term.¹³⁶ However, before Plaintiffs' counsel would support early termination of the monitoring term, they wisely requested an opportunity to conduct a series

131. First Report of the Monitor Prepared Pursuant to the Settlement Agreement at 5-9, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. Dec. 8, 2000) (under seal).

132. Third Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, 6-7, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. June 14, 2001) (under seal).

133. The pilot project was instituted in the Arizona State Prison Complex in Tucson.

134. Prior to the commencement of formal monitoring, DOC paid for Martin to fly to Arizona to meet with key correctional personnel and tour PS facilities.

135. DOC gave Martin an identification badge that allowed unannounced and unimpeded access to its facilities.

136. Fourth Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, 6-7, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. Oct. 23, 2001) (under seal).

of interviews with class members housed at a facility with a large population of PS inmates.¹³⁷ In addition, they requested detailed documentation relating to management of this population.¹³⁸ As a result of counsel's requests, a number of compliance problems were identified. The monitor filed a supplement to his fourth report containing a recommendation that monitoring continue, but be limited to two very narrow issues.¹³⁹ DOC quickly moved to achieve compliance with these two remaining issues, and the court dismissed the case in June 2002, three months short of the second anniversary of the Agreement.¹⁴⁰ Thus, while DOC was unable to take advantage of the "early-out" provision of the agreement, the incentive of that provision clearly helped provide the impetus for it to achieve full compliance with a complex system-wide remedial plan in less than twenty-four months. It is important to note, however, that DOC was fully committed to compliance with the plan prior to the Agreement as it was of its own making, and reflected sound, if not advanced, correctional practices.¹⁴¹

A Snapshot of Today

In the final analysis, DOC's view on how to manage its PS population has come more than full circle. Before the lawsuit began in 1995, 463 out of DOC's 21,247 inmates were housed in PS (2.2%).¹⁴² As of June 30, 2003, 1,019 out of 30,898 DOC inmates had PS status (3.3%).¹⁴³ Thus, relative to population, the number of inmates housed in PS today has actually increased by 50%. Moreover, today's PS inmates enjoy conditions, privi-

137. Memorandum from Tim Eckstein to Larry Hammond and Debbie Hill of November 15, 2001 (privileged document).

138. Letter from Debbie Hill to Bruce Skolnik (Nov. 21, 2001).

139. Supplement to Fourth Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. June 5, 2002) (under seal); Fifth Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. June 5, 2002) (under seal).

140. Order, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. June 17, 2002) (under seal).

141. The plan was fully in place and operational before the Court appointed Martin to monitor DOC's compliance.

142. Ariz. Dep't of Corr., Weekly PS Report for the Week Ending June 2, 1995 (1995).

143. Ariz. Dep't of Corr., Weekly PS Report for the Week Ending June 27, 2003 (2003).

leges and opportunities equivalent to their GP counterparts.¹⁴⁴ Therefore, in just five years (1995-2000), DOC went from operating a PS system deemed “deliberately indifferent” to inmate safety to one that is now among the most enlightened in the nation.

Concluding Observations

Harvard Professor Margo Schlanger, in her insightful law review article, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, states that “the history of litigated prison reform reveals it to be an intricate set of interactions framed by the rules of litigation and involving many groups, with varying roles, interests, and constraints.”¹⁴⁵ We wholeheartedly endorse such a statement, believing that the history of the Arizona PS case exemplifies how such an “intricate set of interactions” can either impede or facilitate ultimate resolution. Here, such interactions clearly coalesced to facilitate, rather than impede, ultimate resolution.

From the outset of the remedial phase, a number of factors came together to create a fertile environment to terminate the court’s jurisdiction over DOC. First, rather than relying on the monitor to design a plan for managing its PS population, DOC put its own plan in place before the monitor’s appointment.¹⁴⁶ Thus, by designing its own remedial plan, DOC remained in control of its own destiny, rather than allowing an outsider to thrust potentially undesirable terms upon it. Second, DOC had been fully engaged in implementation of its plan for well over a year prior to formal and active court ordered monitoring.¹⁴⁷ Third, the selection process for identifying a court monitor minimized some of the more intrusive aspects normally associated

144. Ariz. Dep’t of Corr., System of Written Instructions, Director’s Instruction No. 125 (2001).

145. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1999 (1999).

146. Notice of Filing—Proposed Remedial Plan by the Arizona Department of Corrections Re: Protective Segregation Issues at 20-32, *Does v. Stewart*, CIV 96-0486-WFN (D. Ariz. Feb. 10, 2000).

147. *Id.*; Joint Motion for Conditional Dismissal and Appointment of a Monitor, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. July 13, 2000) (under seal).

with such an appointment.¹⁴⁸ Fourth, during the full term of the monitoring process, counsel for the parties remained constantly, actively and constructively engaged in the compliance process. Finally, key agency personnel proved to be highly competent and committed to achieving compliance, not because they had to, but because they believed their own plan represented not only sound correctional practice, but a state-of-the-art way to manage a difficult prison population.¹⁴⁹

These five factors, in effect, minimized the typically intrusive nature of court ordered reform. Because prisons tend to be insular bureaucratic institutions slow to change, they do not react well to outside participants, both judicial and non-judicial, who seek to alter the status quo. The extent to which a defendant agency can competently and lawfully control its own destiny is the extent to which it is able to minimize the intrusive effects of outside participants. More importantly, when remedial mechanisms are self-imposed, they are more likely to become institutionalized and remain in place long after the judicial participants have gone.

Admittedly, the stars will not always align themselves as well as they did here. When they do not, however, litigants and their counsel should seriously consider using the services of a neutral party, either judicial or retained, to help transition them from an adversarial to a collaborative mode. The fact that Arizona's new PS system continues to thrive, and counsel continues to communicate and cooperate more than a year after formal dismissal of the case, is a testament to the value of such a collaborative approach.

148. Both sides were able to check into the monitor's background and meet with him before they stipulated to his appointment.

149. Fourth Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. Oct. 23, 2001) (under seal); Supplement to Fourth Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. June 5, 2002) (under seal); Fifth Report of the Monitor Prepared Pursuant to the Settlement Agreement at 1, *Does v. Stewart*, CIV 96-0486-PHX-WFN (D. Ariz. June 5, 2002) (under seal).